

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MICHELLE FRANCIS, )  
Plaintiff(s), ) No. C08-2468 BZ  
v. )  
TELECARE CORPORATION, ) ORDER GRANTING  
Defendant(s). ) SUMMARY JUDGMENT

Defendant Telecare Corporation ("defendant" or "Telecare") has moved for summary judgment pursuant to Fed. R. Civ. Proc. 56 on plaintiff Michelle Francis' ("plaintiff") complaint, on the basis that defendant has no liability for allegedly delaying a distribution to plaintiff from its Employee Stock Ownership Plan.<sup>1</sup> For the reasons set forth below, defendant's motion is **GRANTED**.

It is undisputed that plaintiff, an African-American woman, was employed by Telecare from July 2001 until she resigned on May 18, 2006. During her employment, plaintiff

<sup>1</sup> The parties have consented to the jurisdiction of a United States Magistrate Judge for all proceedings including entry of final judgment pursuant to 28 U.S.C. § 636(c).

1 participated in Telecare's Employee Stock Ownership Plan  
 2 ("ESOP"), and at the time of her resignation, her vested ESOP  
 3 account balance totaled over \$3,000.00.

4       Effective July 1, 2005, Telecare revised its ESOP  
 5 distribution policy.<sup>2</sup> Plaintiff was advised of Telecare's  
 6 revised ESOP distribution policy in November 2006. (Francis  
 7 Decl. ¶ 9.) The revised policy provided that former Telecare  
 8 employees would first be eligible to receive a distribution of  
 9 vested ESOP balances on December 31 of the year following the  
 10 year in which the employee's employment with Telecare ended.  
 11 Plaintiff's employment with Telecare ended in 2006; therefore,  
 12 by the terms of the policy, plaintiff became eligible for an  
 13 ESOP distribution on December 31, 2007.

14       In May 2007, plaintiff complained to the U.S. Department  
 15 of Labor that defendant was discriminating against her by  
 16 failing to make a timely distribution of plaintiff's ESOP  
 17 benefit payments.<sup>3</sup> After reviewing Telecare's July 1, 2005  
 18 ESOP distribution policy, the Department of Labor informed  
 19 plaintiff that because her employment terminated in May 2006,  
 20 she was not eligible for an ESOP distribution until December

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21       <sup>2</sup> Effective July 1, 2005, Telecare changed its tax  
 22 reporting to a calendar year, instead of a fiscal year, in  
 23 order to save on taxes.

24       <sup>3</sup> Plaintiff's understanding of the ESOP distribution  
 25 policy was that she would be eligible to receive her ESOP  
 26 benefits by June 2007. This belief was based on a series of  
 27 conversations that plaintiff had with Telecare's Benefits  
 28 Manager, Jasmine Wilson. Ms. Wilson testified at her  
 deposition that she mistakenly told plaintiff that plaintiff  
 would receive her ESOP distribution paperwork in May or June  
 2007, and that this mistake was due to Ms. Wilson's reliance on  
 Telecare's former ESOP distribution policy, which was based on  
 the fiscal year, as opposed to the calendar year.

1 31, 2007.

2 In November 2007, Telecare hired Principal Financial  
3 Group ("Principal") to act as the administrator of its ESOP.  
4 Based on data Telecare provided, which included the names of  
5 all former Telecare employees that had account balances in the  
6 ESOP, on December 5, 2007, Principal generated and mailed  
7 letters to all individuals eligible for a 2007 ESOP  
8 distribution to notify them of their eligibility to receive an  
9 ESOP distribution if they elected to receive one by December  
10 26, 2007.<sup>4</sup> Plaintiff did not elect a distribution within the  
11 applicable election window. Many other Telecare employees  
12 also failed to elect a distribution within the applicable  
13 election window, partly due to the fact that out of  
14 approximately 330 distribution letters that were sent, 113 of  
15 were returned as undeliverable.

16 In January 2008, defendant decided to provide those  
17 employees who did not elect an ESOP distribution during the  
18 2007 election window with another opportunity to receive their  
19 vested ESOP benefits. On May 2, 2008, defendant notified  
20 plaintiff and other former employees who had missed the  
21 original distribution window that they had until August 2,  
22 2008 to elect to receive an ESOP distribution.

23 On July 23, 2008, plaintiff elected to receive an ESOP  
24 distribution, and on August 18, 2008, plaintiff received her

25 \_\_\_\_\_  
26 <sup>4</sup> Defendant submitted evidence that the list of current  
27 and former employees that it sent to Principal did not state  
28 the race or national origin of any of the individuals on the  
list and that Principal would have had no way of identifying  
the race or national origin of any of the Telecare employees.

1 ESOP benefit payment. Plaintiff does not have any remaining  
2 balance in the ESOP.

3 Plaintiff's complaint alleges causes of action under  
4 Title VII of the Civil Rights Act of 1964 ("Title VII"), 42  
5 U.S.C. § 2000e *et seq.* and under the California Fair  
6 Employment and Housing Act ("FEHA"), California Government  
7 Code § 12940 *et seq.* for discrimination on the basis of race  
8 in delaying her distribution and for delaying her distribution  
9 in retaliation for her administrative complaint.

10 Defendant argues that it did not discriminate in sending  
11 plaintiff her ESOP distribution. Rather, defendant claims  
12 that plaintiff was not eligible to receive her vested ESOP  
13 benefits until December 2007, and that when plaintiff received  
14 her distribution election letter in December 2007, she failed  
15 to fill out and mail back the necessary election paperwork,  
16 which constituted a waiver of her right to receive a  
17 distribution from the ESOP in 2007. In support of its  
18 argument, defendant has provided the Court, *inter alia*, with a  
19 copy of the Telecare ESOP Distribution Policy, effective July  
20 1, 2005; a copy of its ESOP Plan Description, dated November  
21 2006; and excerpts from the depositions of, among others,  
22 Kevin Rusch, the Client Relations Manager at Principal.

23 Plaintiff, in order to establish a *prima facie* case that  
24 defendant discriminated against her by unreasonably delaying  
25 the distribution of her ESOP benefits, must show (1) that she  
26 is a member of a protected class; (2) that she was eligible to  
27 receive the employment benefit at issue; (3) that despite her  
28 eligibility, she was subject to adverse treatment; and (4)

1 that similarly situated individuals outside of the protected  
2 class were treated more favorably. Chuang v. University of  
3 California, Board of Trustees, 225 F.3d 1115, 1123-24 (9th  
4 Cir. 2000); *see also* McDonnell Douglas Corp. v. Green, 411  
5 U.S. 792, 802 (1973). Actual proof of discrimination is not  
6 required for a *prima facie* case; all plaintiff must do is  
7 raise an inference that such misconduct occurred. Warren v.  
8 City of Carlsbad, 58 F.3d 439, 442 (9th Cir. 1995). Title VII  
9 also provides that a plaintiff establishes an unlawful  
10 employment practice "when [she] demonstrates that . . . race .  
11 . . was a motivating factor for any employment practice, even  
12 though other factors also motivated the practice." 42 U.S.C.  
13 § 2000e-2(m).

14 If plaintiff succeeds in establishing a *prima facie* case  
15 for discrimination, the burden shifts to defendant to set  
16 forth, through the introduction of admissible evidence, its  
17 purported legitimate, non-discriminatory reason(s) for the  
18 adverse employment action. Texas Dept. of Comm. Affairs v.  
19 Burdine, 450 U.S. 248, 255 (1981). The sufficiency of  
20 defendant's evidence should be evaluated by the extent to  
21 which it (1) meets the plaintiff's *prima facie* case by  
22 presenting a legitimate reason for the action, and (2) frames  
23 the factual issues with sufficient clarity to allow the  
24 plaintiff a full and fair opportunity to demonstrate pretext.  
25 Id. at 255-56. Once a defendant provides a valid,  
26 non-discriminatory reason for taking the alleged adverse  
27 employment action, the burden shifts back to plaintiff to show  
28 that defendant's justification for its decision is pretextual.

1       McDonnell Douglas, 411 U.S. at 804. Plaintiff may meet this  
2 burden either by presenting direct or circumstantial evidence  
3 that discrimination was more likely than not a motivating  
4 cause of defendant's actions, or by attacking the credibility  
5 of the defendant's reasons for its actions. Nidds v.  
6 Schindler Elevator Corp., 113 F.3d 912, 918 (9th Cir. 1996).  
7 If plaintiff fails to make such a showing, the defendant's  
8 motion for summary judgment must be granted. McDonnell  
9 Douglas, 411 U.S. at 804.

10       With regard to her race discrimination claim, plaintiff,  
11 an African-American woman, asserts that she is a member of a  
12 protected class who did not receive employee benefits that she  
13 was eligible to receive in 2007 until late 2008. Plaintiff  
14 identified at least one other individual who she claims was  
15 similarly situated, who is not a member of a protected class,  
16 and who received ESOP distribution benefits before plaintiff  
17 received her benefits.

18       Serious questions exist as to whether plaintiff has made  
19 out a *prima facie* case for race discrimination. As a  
20 threshold matter, I note that while plaintiff declares that  
21 she did not receive the December 5, 2007 ESOP election letter,  
22 to show discrimination by defendant, she needs to offer proof  
23 that defendant did not mail the letter.<sup>5</sup> There are many  
24 reasons, such as lost or stolen mail, why plaintiff may not  
25 have received the letter. On this point, plaintiff has not

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26       <sup>5</sup> Plaintiff's contention is that because of her race,  
27 Telecare intentionally omitted plaintiff's name from the list  
28 of employees that it gave to Principal, which is why plaintiff  
was never sent an ESOP election form in 2007.

1 raised a genuine issue of material fact as to whether her ESOP  
 2 election form was sent to her by Principal. Defendant has  
 3 presented evidence that Principal sent plaintiff an ESOP  
 4 distribution letter, along with approximately 300 other  
 5 letters to eligible employees, via regular first class mail,  
 6 and that the letter sent to plaintiff was never returned to  
 7 Principal as undeliverable. (Decl. of Anne-Marie Waggoner,  
 8 Ex. B. p. 14, 24, 25.) Defendant also provided the Court with  
 9 a copy of the letter that was sent to plaintiff. Plaintiff  
 10 offered no evidence that Principal failed to follow its  
 11 ordinary business procedure in sending her the standard ESOP  
 12 election letter that it sent to all eligible Telecare  
 13 employees. Plaintiff simply says that she did not receive the  
 14 letter, yet she also admits that the address to which  
 15 defendant claims to have sent the letter was her correct  
 16 mailing address. (Francis Decl. ¶ 13.) Mere denial of  
 17 receipt does not raise a genuine issue of material fact as to  
 18 mailing.<sup>6</sup> Mahon v. Credit Bureau of Placer County Inc., 171

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19         <sup>6</sup> Even if actual receipt of the letter was material to  
 20 this dispute, I find that defendant is entitled to a  
 21 presumption that plaintiff received a distribution election  
 22 letter in December 2007. The common law mailbox rule provides  
 23 that "proper and timely mailing of a document raises a  
 24 rebuttable presumption that it is received by the addressee." "Mahon, 171 F.3d at 1202 ("Under the common law mailbox rule,  
 25 proper and timely mailing of a document raises a rebuttable  
 26 presumption that it is received by the addressee.") In Mahon,  
 27 the court held that the plaintiff's mere assertions of  
 28 non-receipt of a letter did not rebut the presumption,  
 established by evidence of the defendant's standard mailing  
 procedures, that the letter had been sent. Id. As in Mahon,  
 plaintiff's statements of non-receipt are not enough to  
 overcome the presumption that the December 5, 2007 ESOP  
 distribution election letter was sent and received.  
 Additionally, even if plaintiff could rebut the presumption of  
 receipt, plaintiff has provided no evidence that defendant

1 F.3d 1197, 1201-02 (9th Cir. 1999) (quoting Anderson v. United  
 2 States, 966 F.2d 487, 491 (9th Cir. 1992)); *see also Meckel v.*  
 3 Continental Resources Co., 758 F.2d 811, 817 (2d Cir. 1985).

4 Plaintiff also offers her declaration that in January  
 5 2008, she spoke to an unidentified person at Principal who  
 6 informed her that Telecare had not notified Principal that  
 7 plaintiff was eligible to receive her ESOP benefits and that  
 8 she was not in Principal's system. (Francis Decl. ¶ 39.) I  
 9 find this evidence to be too ambiguous to create an issue of  
 10 fact as to whether plaintiff's ESOP election letter was sent  
 11 by Principal in 2007. It appears to confirm that in January  
 12 2008, plaintiff was not eligible to receive benefits because  
 13 she had not submitted a timely election. In light of the  
 14 evidence submitted by both parties, I find that no reasonable  
 15 jury could conclude that an ESOP distribution election letter  
 16 was not sent to plaintiff by Principal.

17 It is also doubtful that she has experienced adverse  
 18 treatment, since she timely received her ESOP benefits after  
 19 she applied for the distribution in 2008. Additionally,  
 20 plaintiff has not identified any similarly situated  
 21 individuals, outside of a protected class, who were treated  
 22 more favorably. To have been treated more favorably, an  
 23 individual, not within a protected class, must have ended  
 24 employment with Telecare in 2006, and received an ESOP

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25 acted with discriminatory intent in failing to send her the  
 26 distribution election letter. Costa v. Desert Palace, Inc.,  
 27 299 F.3d 838, 854 (9th Cir. 2002), *aff'd* by Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). There is no evidence, direct or  
 28 circumstantial, of discriminatory intent. *See Vasquez v. County of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003).

1 distribution in 2007 despite having failed to submit the  
2 necessary election paperwork within the election window  
3 provided by Telecare. In her declaration, plaintiff  
4 identifies four individuals who she claims were treated more  
5 favorably than she. Preliminarily, plaintiff has submitted no  
6 evidence that these individuals did not timely elect to  
7 receive the distributions they received. In any event,  
8 defendant has introduced evidence that all of the four  
9 received a distribution consistent with the revised  
10 distribution policy (December of the year following their  
11 termination), and plaintiff has submitted no evidence to the  
12 contrary.<sup>7</sup>

13 Defendant has also introduced evidence that other  
14 African-American employees were sent ESOP distribution  
15 letters. This evidence suggests that even if a letter was not  
16 sent to plaintiff, it was not because of racial animus. Even  
17 assuming, however, that plaintiff established a *prima facie*  
18 case for race discrimination, Telecare has offered a  
19 legitimate, nondiscriminatory reason for its conduct, and  
20 plaintiff has failed to establish that its reason is  
21 pretextual. Aside from plaintiff's mere assertions, there is  
22 no evidence before the Court that defendant's alleged delay in  
23 sending plaintiff her ESOP distribution payment was motivated  
24 by discriminatory intent. Based on the record before the  
25 Court, plaintiff has failed to create a triable issue as to  
26 whether Telecare's stated reason for sending plaintiff her

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27       <sup>7</sup> In fact, plaintiff's declaration affirms defendant's  
28 position. (See Francis Decl. ¶ 27.)

1 ESOP distribution in 2008 (failure on the part of plaintiff to  
2 timely submit the necessary paperwork) was pretextual. See  
3 Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1222 (9th Cir.  
4 1998). Accordingly, plaintiff's Title VII discrimination  
5 claim does not survive summary judgment.

6 As with plaintiff's discrimination claim, plaintiff must  
7 also set forth a *prima facie* case for her retaliation claim.<sup>8</sup>  
8 To establish a *prima facie* case for unlawful retaliation,  
9 plaintiff must show that: 1) she engaged in protected  
10 activity; 2) her employer subjected her to an adverse  
11 employment action; and 3) there is a causal link between the  
12 protected activity and the adverse employment action. Davis  
13 v. Team Elec. Co., 520 F.3d 1080, 1094 (9th Cir. 2008); see  
14 also Cornwell v. Electra Cent. Credit Union, 439 F.3d 1018,  
15 1035 (9th Cir. 2006); Ray v. Henderson, 217 F.3d 1234, 1240  
16 (9th Cir. 2000).

17 Plaintiff argues that she engaged in protected activity  
18 by filing a complaint of racial discrimination with the U.S.  
19 Department of Labor in May 2007 and that Telecare retaliated  
20 against her for complaining by unlawfully delaying her ESOP  
21 distribution. Again, it is doubtful that plaintiff has  
22 experienced an adverse employment action, since she timely  
23 received her ESOP benefits after she applied for the  
24 distribution in 2008 and she has not satisfactorily disputed  
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26 <sup>8</sup> The McDonnell Douglas framework governs the analysis  
27 of both discrimination and retaliation claims in the summary  
judgment context. See McGinest v. GTE Serv. Corp., 360 F.3d  
1103, 1122, 1124 (9th Cir. 2004) (citing McDonnell Douglas  
28 Corp. v. Green, 411 U.S. 792, 802-05 (1973)).

1 defendant's evidence that she was mailed a distribution letter  
 2 on December 5, 2007. Nor has plaintiff has provided any  
 3 evidence, aside from her own assertions, that defendant's  
 4 alleged delay in sending plaintiff her ESOP distribution  
 5 payment was causally related to plaintiff's communication with  
 6 the Department of Labor. Even if plaintiff's evidence is  
 7 sufficient to establish a *prima facie* case for retaliation,  
 8 plaintiff fails to set forth any evidence to demonstrate that  
 9 defendant's asserted reason for the delay in plaintiff's ESOP  
 10 distribution payment is pretextual. Plaintiff's conclusory  
 11 assertions that her complaint to the Department of Labor was a  
 12 motivating reason for Telecare's failure to distribute  
 13 plaintiff's ESOP benefit payment to her by December 2007 are  
 14 insufficient to avoid summary judgment. Collings v. Longview  
 15 Fibre Co., 63 F.3d 828, 834 (9th Cir. 1995); see also Wallis  
 16 v. J.R. Simplot Co., 26 F.3d 885, 890-91 (9th Cir. 1994).<sup>9</sup>

17 Plaintiff's second cause of action for violations of FEHA  
 18 fall within ERISA's preemptive scope. ERISA preempts "any and  
 19 all State laws insofar as they may now or hereafter relate to  
 20 any employee benefit plan" governed by ERISA. 29 U.S.C. §

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22 <sup>9</sup> During argument, plaintiff's counsel asserted that  
 23 the "timing" of the events at issue, which amounts to a period  
 24 of seven months, is sufficient to create a causal link between  
 25 the protected activity and the adverse employment action. The  
 26 Ninth Circuit has rejected any bright-line rules about the  
 27 timing of retaliation, and has held that "[w]hether an adverse  
 28 employment action is intended to be retaliatory is a question  
 of fact that must be decided in the light of the timing and the  
 surrounding circumstances." Coszalter v. City of Salem, 320  
 F.3d 968, 978 (9th Cir. 2003). Beyond timing, plaintiff offers  
 no other evidence of the "surrounding circumstances" that would  
 create a genuine dispute concerning whether defendant's  
 conduct, assuming it was adverse, was retaliatory.

1 1144(a); Geweke Ford v. St. Joseph's Omni Preferred Care Inc.,  
 2 130 F.3d 1355, 1358 (9th Cir. 1997); Gibson v. Prudential Ins.  
 3 Co. of Am., 915 F.2d 414, 416 (9th Cir. 1990). "Even claims  
 4 brought under state-law doctrines that do not explicitly refer  
 5 to employee benefit plans are preempted when the claims arise  
 6 from the administration of such plans whether directly or  
 7 indirectly." Gibson, 915 F.2d at 414 (citing Ellenburg v.  
 8 Brockway, Inc., 763 F.2d 1091, 1095 (9th Cir. 1985)).  
 9 Plaintiff's FEHA claim directly relates to her contention that  
 10 she did not receive a timely distribution of her ESOP benefits  
 11 because of race discrimination and unlawful retaliation. This  
 12 claim is therefore connected to the ESOP, which is related to  
 13 an ERISA plan and is therefore preempted by ERISA.

14 Viewing the evidence in the light most favorable to the  
 15 plaintiff, I find that plaintiff failed to create a triable  
 16 issue of fact over whether defendant discriminated or  
 17 retaliated against her by distributing her ESOP benefit  
 18 payments in 2008.

19 For the reasons discussed above, **IT IS ORDERED** that  
 20 defendant's motion for summary judgment is **GRANTED** with  
 21 respect to all claims.

22 Dated: June 4, 2009

23   
 24 Bernard Zimmerman  
 25 United States Magistrate Judge

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